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No. 84-1827

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROBERT F. SIMONE,

Petitioner

v.

GOLDEN NUGGET HOTEL & CASINO,
t/a G.N.A.C. CORP.,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals erred in dismissing for lack of jurisdiction the Appeal by the Petitioner from a new trial Order issued by the District Court following Post Trial Motions filed pursuant to Federal Rule of Civil Procedure 59(a).

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

RULE AND STATUTE IN QUESTION

Contrary to the statement of Simone, Rule 54(b) of the Federal Rules of Civil Procedure and 28 U.S.C. Section 1291 are in question.

Rule 54(b) provides:

> *Judgment Upon Multiple Claims or Involving Multiple Parties.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or

1. Respondent, G.N.A.C. Corp., t/a Golden Nugget Hotel and Casino, a New Jersey Corporation, is a wholly owned subsidiary of Golden Nugget, Inc., a public Nevada Corporation.

when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

28 U.S.C. Section 1291 provides:

Final decisions of district courts. The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, The District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

FACTS

Respondent sets forth the salient facts of this case because of certain inaccuracies and misleading statements in the Petition for a Writ of Certiorari.

In the early hours of August 24, 1981, a disturbance involving lou[illegible] noises and cursing broke out at the black-

jack table area of the Golden Nugget Hotel & Casino in Atlantic City, New Jersey in which patrons identified as Charles Warrington, Thomas Delgiorno and Salvatore Merlino became belligerent, abusive and combative. Simone voluntarily injected himself into this fracas and from that moment, there was constant interaction between the Golden Nugget Security Personnel and Simone with his "clients" and cohorts.

At the moment he interjected himself, Simone made a racially insulting remark to Security Sergeant Edward J. Dixon; he called him a "nigger". Simone, Delgiorno, Warrington and Merlino proceeded to push by the security guard personnel. When Simone, Delgiorno, Warrington and Merlino refused to leave the Golden Nugget, as requested by the security personnel, Simone and the others were advised that they were to be the subject of a "formal eviction".

A "formal eviction" was described by Golden Nugget security as a process whereby a disruptive, disorderly patron is advised, in the security office, that the patron is no longer welcome at the Golden Nugget Hotel and Casino and is not to return. If possible, a picture of the person is taken and the person is advised that upon his or her return to the casino, the patron will be considered as a "defiant trespasser" and subject to the New Jersey criminal law relating to such status. This is the way such disruptive and potentially dangerous persons are kept out.

Simone and his companions were escorted from the casino area and into the hallway to be crossed in order to gain access to the security elevator area at which point elevators would be utilized to escort the patrons to the security office on the second floor of the building.

Upon entry into the hallway, Simone and others began walking away from the security officers toward the lobby area where some pushing and shoving occurred involving Simone, Sergeant Dixon, and also Sergeant Palmieri of the security force.

Simone has claimed that he suffered injury when "thrown" into the elevator by Sergeant Dixon. Sergeant Dixon and Sergeant Palmieri complained that Simone pushed each of them in the chest area.

When the elevator would not function properly, Simone and his companions were led outside the casino with the thought of utilizing the stairway to the second floor security office. At that time, Atlantic City Police appeared on the premises and custody of Simone and his companions was passed on to the Atlantic City Police Officers who removed the men from the scene and took them to the Atlantic City Police Station.

Simone remained combative and insulting until turned over to the Atlantic City Police by the Golden Nugget Security Personnel. The Trial Court refused to permit any testimony on the conduct of the Plaintiff once he was in the custody of the Atlantic City Police.

Thereafter Dixon and Palmieri filed a criminal complaint against Simone and his three companions for their conduct.

When Dixon and Palmieri appeared at the Atlantic City Police Station to charge the four men, including Simone, with the assault and battery they committed on the premises of the Golden Nugget, the police insisted that the two men provide the police with statements as to what occurred and sign criminal complaints in blank so that the police officers could fill in the formal charges at a later date. This was the procedure of the Atlantic City Police Department and Dixon and Palmieri complied with the request. It was later determined that the Police indicated in the Complaint that Simone assaulted Palmieri and Dixon about the head, face and body rather than in the chest. The criminal charges against Simone terminated in favor of Simone because of the discrepancy between what the Police indicated in the Complaint and what was actually involved in the assault and battery by Simone of Palmieri and Dixon.

There was no evidence that anyone had any ulterior motive for the filing of the criminal Complaints nor was there any evidence that anyone harbored any ill will against Simone.

Consequently, the jury found in favor of the Golden Nugget on the claims of assault and battery and malicious prosecution.

The jury found in favor of Simone on the false imprisonment and abuse of process claim. It awarded $150,000.00 in compensatory damages and $1,000,000.00 in punitive damages.

Both Simone and the Golden Nugget filed alternative post trial motions for judgment n.o.v. or for a new trial.

Both parties in their post trial motions and briefs in support thereof included charges that the Trial Court erred with respect to what the jury could consider in determining compensatory damages.

After submission of briefs and full oral argument on all issues, the Honorable James T. Giles in the United States District Court for the Eastern District of Pennsylvania granted the requests of both Simone and the Golden Nugget and granted a new trial on the issue of false imprisonment. The reason was stated by the Trial Court at Pet. App. 22:

> Both plaintiff and defendant contend that the Court erred in the admission or exclusion of certain evidence at trial and that it also erred in the charge as to future losses. These objections become very relevant since the award for false imprisonment may have included compensation for some or all of the plaintiff's physical injuries. . . .

Contrary to the statement by Simone, the Trial Court did not merely state that the plaintiff should have had the benefit of a "more correct" charge to the jury. As stated by the Trial Court at Pet. App. 22; 24:

> Plaintiff maintains that the Court erred in instructing the jury that an award for future medical expenses should be based upon a 'reasonable degree of certainty' as opposed to a 'reasonable probability'. On reflection, the Court agrees that it would have been more correct to have charged as plaintiff requested (Pet. App. 23).
>
> * * * *
>
> . . . defendant complains because Dr. Simon was permitted to testify about the risks of . . . [future] surgery. On balance, I conclude that all testimony relative to the surgery should have been excluded (Pet. App. 24).
>
> * * * * *
>
> . . . it was an error for the Court to have allowed such testimony (Pet. App. 24).

The Trial Judge was responding to the assignment of error of Simone that the trial court erred in instructing the jury on the standard to be used in determining future medical expenses (Resp. App. 6).

Clearly, the Trial Court did not act on its own initiative in granting a new trial on the issue of false imprisonment. Notwithstanding the fact that the Trial Court acted pursuant to the motion requests of the parties, Simone appealed to the U.S. Court of Appeals for the Third Circuit contending that Judge Giles acted sua sponte in ordering the new trial in violation of Rule 59(d).

After extensive briefing and oral argument on the issue of whether, in accordance with 28 U.S.C. Section 1291 and Federal Rule of Civil Procedure 54(b), the United States Court of Appeals for the Third Circuit had jurisdiction over an appeal by Simone, the Court of Appeals dismissed Simone's appeal for lack of jurisdiction. In doing so, the Court of Appeals implicitly found that the Order of the Trial Court granting a new trial was in substantial compliance with Federal Rules of Civil Pro-

cedure 59(a) and 59(d). The holding of the Court of Appeals is in conformity with the applicable principles expressed in prior case law of the Courts of Appeals and this Honorable Court.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals for the Third Circuit is in accordance with Federal Rule of Civil Procedure 59(a) and 59(d) and the principles expressed in prior case law of the Courts of Appeal and this Honorable Court.

ARGUMENT

The legal principles which govern the decision here have been well established by this Court and the Federal Courts generally.

As provided by 28 U.S.C. Sec. 1291 the jurisdiction of the Court of Appeals, with an exception not applicable to this case, is limited to:

> . . . all final decisions of the district courts of the United States. . .

Where, as in the present multiclaim action, an Order of the Court adjudicates less than all the claims and a party has not moved for certification of the Order as a final Order, an appeal from that Order will not lie.

Rule 54(b) of the Federal Rules of Civil Procedure provides a procedure for Certification of an Order as a final order. Simone chose not to follow that procedure.

As stated by the Court in *Clark v. United States*, 624 F.2d 3 (2nd Cir. 1980) at 4:

> . . . the requirements of Rule 54(b) are jurisdictional rather than discretionary.

Simone sought to have jurisdiction attach charging that Judge Giles' Order violated Federal Rule of Civil Procedure 59(d). He complains that the Judge entered his

Order on his own initiative more than ten days after the entry of Judgment. There is, however, no foundation to this claim. Simone asked for a new trial and a new trial was granted.

As the post trial motion of Simone reveals, he sought a new trial claiming that the Trial Court erred in instructing the jury that an award for future medical expenses should be based upon a "reasonable degree of certainty" as opposed to "reasonable probability". A careful reading of assignment of error 19 in Simone's motion for a new trial (Resp. App. 5) indicates that the assigned error with respect to the standard to be used in fixing damages for future medical expenses is not limited to any one claim but rather was made with respect to all claims:

> 19. *In connection with his charge on compensatory damages*, the Court erred in instructing the jury that the standard to be used in fixing damages for future losses flowing from defendant's assault and battery is 'reasonable certainty'. The correct standard under New Jersey law is 'reasonable probability'. (Emphasis added)

There was no separate instruction to the jury as to what standard it should apply in fixing damages for future losses flowing from the alleged assault and battery (Resp. App. 7-9). Simone was asking for a new trial since he was disappointed with the amount of the verdict. The record clearly shows that it was after the jury was charged with respect to each of the elements necessary for a finding of liability with respect to the four theories of liability asserted by Simone that the Court instructed the jury with respect to awarding compensatory damages:

> If you answer *as to any claim* that the claim was proven and was the proximate cause of harm, whether physical, emotional or whatever, then you have to decide what value in the way of money dam-

ages should be applied to the injuries or the harm of which you find, and you should express that in a lump sum. You must express it in a lump sum. (Emphasis added)

You get to damages if you found that there was legal responsibility. If you get to damages, then you must award the Plaintiff a sum which will fairly, reasonably and adequately compensate him for all of the *injuries* which you find that he has *sustained by reason of any unlawful conduct* of the defendant under either of those claims. (Emphasis added). (Resp. App. 8)

* * * *

. . . the plaintiff, in addition, claims a value for any future medical expenses as shown by the evidence. You will have to review the evidence and decide whether or not the plaintiff will have to expend in the future any sums of money *by standard of reasonably certain*, that is, you have to decide yourselves whether or not you are reasonably certain that the plaintiff will have to sustain or will have to expend future sums of money for treatment for *physical injuries* if you find there are *any related to this incident* and charge the defendant. (Emphasis added). (Resp. App. 9)

The assignment of error by Simone complains that the jury instruction was erroneous. Simone cannot complain when the Trial Court agreed and ordered a new trial.

The Golden Nugget in its post trial motions specifically raised as supplemental error No. 1 (Resp. App. 10) entitling the Golden Nugget to a new trial that:

The Trial Court erred in permitting Dr. Simon to testify to the risks of surgery, if performed, on Robert Simone.

The Trial Court in deciding the Post Trial Motions specifically addressed the errors raised by both parties in seeking a new trial (Pet. App. 22; 24). The Order of the Trial Court granting a new trial in this matter is clearly within the concept of error raised by both Simone and the Golden Nugget in their post trial motions. The Order of Judge Giles was not reviewable because the Court of Appeals did not have jurisdiction.

If it were determined that Judge Giles did order a new trial on the issue of false imprisonment after post trial motions were timely filed, but for a reason not stated in the Motions, Judge Giles still complied with Federal Rule of Civil Procedure 59(d). Rule 59(d) specifically provides that the trial court is empowered to grant a new trial sua sponte:

> Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. *After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion.* In either case, the court shall specify in the order the grounds therefor. (Emphasis added)

Simone overlooked the 1966 Amendments to Rule 59(d) which modified the Rule to allow the trial court to enter such an order beyond the ten day period.

The history of that Amendment has been recited as follows:

> Prior to its 1966 amendment, Rule 59(d) was interpreted to preclude a trial court from granting a new trial on a ground not stated in a motion filed seasonably, i.e., within 10 days of the entry of judgment. *See, e.g., Russell v. Monongahela R.R. Co.* 262 F.2d 349 (2d Cir. 1958); *Fried v. McGrath,* 76 U.S. App. D.C. 388, 133 F.2d 350 (1942); *Marshall's U.S.*

> *Auto Supply, Inc. v. Cashman*, 111 F.2d 140 (10th Cir.), *cert. denied*, 311 U.S. 667, 61 S.Ct. 26, 85 L.Ed. 428 (1940). According to the Notes of the Advisory Committee on Rules, this situation was 'undesirable'. The Committee noted that '[j]ust as the court has power under Rule 59(d) to grant a new trial of its own initiative within the 10 days, so it should have the power, when an effective new trial motion has been made and pending, to decide it on the grounds thought meritorious by the court although not advanced in the motion'. *The second sentence of Rule 59(d) was added in 1966 to afford the trial court this authority.* But the expansion of the trial court's power to order a new trial for reasons not raised by the mover does not operate to extend the period in which the court can grant a new trial on its own initiative. (Emphasis added)

Tarlton v. Exxon, 688 F.2d 973, 978 (5th Cir. 1982). The Court, in *Tarlton*, noted that the time limit for filing a new trial motion imposed in Rule 59(b) is mandatory and jurisdictional but, clearly, the 1966 Amendment to Rule 59(d) gave the Court much greater latitude to enter Orders to achieve substantial justice even though the parties may not have presented the issue as well as the Court had preferred.

The Notes of the Advisory Committee on Rules prepared at the time of the drafting of the 1966 Amendment to Rule 59(d) reads in relevant part, as follows:

> 1966 AMENDMENT
>
> By narrow interpretation of Rule 59(b) and (d), it has been held that a trial court is without power to grant a motion for new trial, timely served, by an Order made more than 10 days after the entry of judgment, based upon a ground not stated in the motion but perceived and relied on by the trial court sua sponte. (citations excluded)

> *The result is undesirable.* Just as the Court has power under Rule 59(d) to grant a new trial of its own initiative within the 10 days, so should it have power, when an effective new trial motion has been made and is pending, to decide it on grounds thought meritorious by the court although not advanced in the motion. The second sentence added by amendment to Rule 59(d) confirms the court's power in the latter situation with provision that the parties be afforded a hearing before the power is exercised. . . . (Emphasis supplied)

Notes of the Advisory Committee on Rule 59, F.R. Civ. P.

The record reveals that following the verdict and entry of judgment, Motions for New Trial were filed, argument was received and the Memorandum and Order of July 11, 1984 followed. Thus, it is clear that the second sentence added to the Rule in 1966 permits the District Court to act on its own beyond the ten day period if the parties have filed timely Motions requesting a new trial.

Simone incorrectly contends that the Court of Appeals has held that mere failure to give the required notice under Federal Rule of Civil Procedure 59(d) renders the new trial Order both void and appealable and cites *Harkins v. Ford Motor Co.*, 437 F.2d 276 (3rd Cir. 1970). In *Harkins*, it was contended that an order for a new trial was a nullity because the trial court failed to comply with the notice requirement of Rule 59(d). The Court of Appeals specifically stated that the *reasons* relied upon by the District Court would not justify the granting of a new trial and never decided the Rule 59(d) issues. At 277, the Court clearly states:

> We do not find it necessary to resolve the question whether, in every case, failure to comply with the notice requirements of Fed. R. Civ. P. 59(d) deprives the District Court of power to grant a new trial for reasons not stated in a pending motion for a new trial, because *we have concluded that the reasons ad-*

> *vanced by the District Court are insufficient on the merits.* After a careful consideration of the record in this case, *we conclude that neither of the two reasons relied upon by the District Court would justify the granting of a new trial.* (Emphasis added)

As Simone concedes, the 8th Circuit in *Central Microfilm Services v. Basic/Four Corp.*, 688 F.2d 1206 (1982) would not adopt the strict construction that is sought by Simone to be applied to the present case. As stated by the Court at 1212:

> . . . we decline to adopt a rule which would render new trial orders immediately appealable where the only defect is a technical lack of notice and such defect is cured by a subsequent opportunity to be heard.

The 8th Circuit noted that the lower court had allowed a reconsideration of its initial Order and thus the "notice" provision of Rule 59(d) was met. Simone did argue his Motion for a New Trial before Judge Giles. Simone never filed a Motion for Reconsideration.

Simone's innuendo that the Order of Judge Giles may be ambiguous is also unavailing to him. It is well settled that any ambiguity in an order of the Trial Court should be resolved in favor of the Trial Court. As stated in *Southern Pac. Co. v. United States District Court*, 190 F.2d 735 (9th Cir. 1951) at 737:

> The presumption that official action was regularly performed would seem to require us to resolve any possible ambiguity in the Order in favor of a holding that the Court acted upon . . . (the party's) motion with respect to which it still had jurisdiction to act.

If it were believed that Judge Giles did not adequately specify the grounds for ordering a new trial, the Lower Court should be given the opportunity to correct the omission.

> If, however, the Court did, in fact, act upon specified ground, but by oversight or omission the grounds were not included in the Order, the Court may correct this error on its own initiative or on motion of a party under Rule 60(a).

6A Moore's *Federal Practice* Section 59.11 at 59-270 (1984) *Cf. National Farmers Union Auto & Cas. Co. v. Wood*, 207 F.2d 659 (10th Cir. 1953). Clearly, the District Court must be afforded an opportunity to articulate more reasons for the Order if it is believed that the earlier Order is insufficient.

Unlike the Order of the Trial Court in *Phillips v. Negley*, 117 U.S. 665 (1886), the Order of the Trial Court granting a new trial on the issue of false imprisonment is a valid Order and therefore not appealable. Thus, the decision of the Court of Appeals that it does not have jurisdiction of an appeal from the new trial Order is in accord with this Court's decision in *Phillips*.

The contentions by Simone of injustice and excess on the part of the Trial Court are without foundation.[2]

Petitioner's Authorities Distinguished

Simone relies principally upon *Phillips v. Negley, supra, Tarlton v. Exxon*, 688 F.2d 973 (5th Cir. 1982), *cert. denied sub nom. Diamond M Drilling Corp. v. Tarlton*, 103 S. Ct. 3536 (1983); *Stradley v. Cortez*, 518 F.2d 488 (3d Cir. 1975); *Peterman v. Chicago, Rock Island & Pacific Ry. Co.*, 493 F.2d 88 (8th Cir. 1974) *cert.*

2. By way of further information, the jury in the underlying case did not allocate the "lump sum" damage awards between the two theories in which they found in favor of Simone: False imprisonment and abuse of legal process. Once the District Court entered Judgment N.O.V. on the theory of abuse of legal process, the entire false imprisonment charge had to be retried. *Cf. United New York and New Jersey Sandy Hook Pilots Association v. Halecki*, 358 U.S. 613 (1959); *Albergo v. Reading Co.*, 372 F.2d 83 (3rd Cir. 1966) and *Nappe v. Anschelewitz, et al* 189 N.J. Super. 347 (App. Div. 1983), *aff'd* 97 N.J. 37 (1984).

denied, 417 U.S. 947 (1975); *Lapiczak v. Zaist*, 451 F.2d 79 (2d Cir. 1971); *Demeretz v. Daniels Motor Freight, Inc.*, 307 F.2d 469 (3d Cir. 1962); *Tsai v. Rosenthal*, 297 F.2d 14 (8th Cir. 1961); *Freid v. McGrath*, 133 F.2d 350 (D.C. Cir. 1942).

A review of the procedural facts in the cases relied upon by Simone clearly show that none of the cases are applicable since the Trial Court acted within its power in entering an Order for a New Trial. Thus, the Court of Appeals properly determined that it did not have jurisdiction to entertain the appeal Simone sought.

In *Phillips v. Negley, supra*, the Trial Court granted the Motion of the Defendant to vacate the judgment and set aside the verdict entered against him although the Motion was filed beyond the time period allowed for filing such a motion. This Honorable Court held that the Order of the Trial Court was void because it had been entered after the time allowed for the entry of such an order. This Honorable Court further held that because the Order of the Trial Court was void, the Order could be reviewed on appeal. Where, as in the present case, the Order of the Trial Court granting a new trial followed the timely filing of Motions for a New Trial by both parties and is based on reasons raised by the parties, there is no basis of appeal as there was in *Phillips v. Negley*.

The cases cited by Simone as applying the principles of *Phillips v. Negley* are also inapposite.

In *Tarlton v. Exxon, supra*, the Court of Appeals had jurisdiction to review the order of the trial court granting a defendant a new trial when that defendant did not file a timely motion but sought, at oral argument, to join in the motion of another defendant which motion it had originally opposed.

In *Stradley v. Cortez, supra*, the trial court entered an order granting a new trial when, almost four years after the judgment was entered, the plaintiff filed a motion to have the docket changed and judgment entered against both instead of only one of the defendants.

In *Peterman v. Chicago Rock Island & Pacific Ry. Co., supra*, the trial court was found to have exceeded its power in ordering a new trial where the only motion filed was a motion for judgment N.O.V. that did not seek a new trial as an alternate form of relief.

In *Lapiczak v. Zaist, supra*, an order for a new trial was entered by the trial court more than ten days after judgment on the verdict was entered and when neither party had filed a timely post trial motion.

In *Demeretz v. Daniels Motor Freight, Inc., supra*, and *Freid v. McGrath, supra*, orders granting a new trial on the issue of damages were found appealable where the motions for a new trial that were timely filed did not contain a suggestion of a contention that the verdict was either excessive or inadequate.

Finally, in *Tsai v. Rosenthal, supra*, the trial court specifically stated that it was acting upon its own motion in granting a new trial as between the plaintiff and one of the defendants and as between two defendants on their crossclaim. Importantly, the Court of Appeals, in reviewing the record before it, went on to explain that remand to the Trial Court is the proper procedure where an Order for a New Trial may be based on grounds fairly raised in a party's motion. As stated by the Court at 620, 621:

> The record before us affords a reasonable basis for believing that the trial court while stating it was acting upon its own motion, actually granted a new trial as between plaintiff and Rosenthal and upon Mound's cross-claim against Rosenthal for contribution upon the basis of grounds fairly raised in Mound's motion. While we have serious doubt whether the new trial granted Mound on the plaintiff's claim is based upon any ground contained in Mound's motion, upon remand the trial court is directed to reconsider and pass upon the motion filed by Mound in its entirety and determine in its discre-

tion what, if any, relief Mound is entitled to upon the basis of grounds fairly raised in its motion.

As explained further by the Court in *Tsai, supra,* at 619:

> Respectable authority exists for giving motions for new trial filed by the parties a broad construction for the purpose of determining whether the court acted upon a motion of the party or upon its own motion in considering the issue of jurisdiction for the court to act. *See Cooper v. Midwest Feed Products Co., supra; Lebeck v. William A. Jarvis, Inc.,* 3 Cir., 230 F.2d 285, 289; *Citizens National Bank of Lubbock v. Speer,* 5 Cir., 220 F.2d 289.

In determining that it did not have jurisdiction over the appeal sought by Simone, the Court of Appeals properly found that the Order of the Trial Court granting a new trial was in compliance with Federal Rule of Civil Procedure 59 and the cases applying the rule.

CONCLUSION

It is respectfully submitted that petitioner has failed to sustain his burden of establishing under Supreme Court Rule 17 that there are special and important reasons why the Writ should be granted.

The Third Circuit Court of Appeals correctly determined that it did not have jurisdiction over this matter since the Order of the Trial Court granting a new trial was a proper Order and, therefore, that Simone was seeking to appeal from a non-final Order, in contravention of Federal Rule of Civil Procedure 54(b).

The ruling of the Third Circuit Court of Appeals is in accord with the letter and purpose of Rule 59(a) and 59(d). This matter should be returned to the District Court for the New Trial as ordered.

As provided by Supreme Court Rule 17, a review on Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor.

Because there are no special and important reasons for a review of the within matter, the Petition for Writ of Certiorari should be denied by this Honorable Court.

Respectfully submitted,

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APPENDIX

BEASLEY, HEWSON, CASEY, COLLERAN,
ERBSTEIN & THISTLE
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ROBERT F. SIMONE	:	IN THE UNITED
	:	STATES DISTRICT
	:	COURT FOR THE
	:	EASTERN DISTRICT
v.	:	OF PENNSYLVANIA
	:	
GOLDEN NUGGET	:	CIVIL ACTION
HOTEL AND CASINO,	:	
t/a G.N.A.C. CORP.	:	
	:	NO. 82-1450

ALTERNATIVE MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT PURSUANT TO RULE 50(b) OR MOTION FOR NEW TRIAL PURSUANT TO RULE 59.

Plaintiff moves the court to set aside the verdicts returned in favor of defendant of Count II (assault and battery) and Count III (malicious prosecution) in the above entitled action on March 30, 1983, and the judgment entered in favor of defendant thereon on March 31, 1983, and to enter judgment in accordance with the motion for directed verdict made by the plaintiff at the close of all testimony herein, on the grounds, as stated in that motion, that:

1. Plaintiff's involuntary detention by defendant's employees was without legal authority.

2. Defendant's employees initiated unlawful and unjustifiable physical and mental force against plaintiff in

order to effect his illegal detention. Officer Palmieri and Sergeant Dixon testified that the plaintiff was attempting to leave the hotel. He was prevented from doing so and was forcibly returned and shoved through a set of double doors leading to the service elevator area. The testimony of Palmieri, Dixon and Lieutenant Boone established that it was not until the plaintiff was prevented from leaving and was physically restrained, that plaintiff began to push and shove in an effort to secure his freedom and leave defendant's premises.

3. Defendant's employees, Palmieri and Dixon, admitted that they signed blank complaints against plaintiff and that the charges later typed upon those complaints accused plaintiff of simple assault by striking and beating Palmieri and Dixon about the face and body. The officers admitted that these charges were false inasmuch as neither of them had been struck or beaten by plaintiff about the face and body.

4. Defendant's employees refused to withdraw the charges and continued the prosecution appearing at the criminal trial to testify against plaintiff on the false charges and admitting during that testimony that the charges against plaintiff stated in the complaint were false. A judgment of acquittal on the charges was entered in plaintiff's favor.

5. Thus, there were no controverted material issues of fact upon which reasonable persons could differ pertaining to defendant's liability on Count II (assault and battery) and Count III (malicious prosecution). The evidence was uncontroverted that defendant's employees initiated and continued criminal proceedings against plaintiff charging him with assault by striking and beating Palmieri and Dixon about the face and body in the absence of probable cause to believe that plaintiff committed such an assault. Thus, defendant became liable to plaintiff for malicious prosecution. Furthermore, the evidence adduced at trial was controverted that, in fact, defendant's employees initiated the unlawful physical

contact with plaintiff, thereby rendering defendant liable to plaintiff for assault and battery.

In the alternative, plaintiff moves the court to set aside the jury verdicts returned on Count II (assault and battery) and Count III (malicious prosecution) and judgment entered thereon and grant plaintiff a new trial on Count II (assault and battery) and Count III (malicious prosecution) as to liability, compensatory and punitive damages. In support of the motion, plaintiff relies on the following grounds:

1. The verdicts on assault and battery and malicious prosecution are contrary to the law.

2. The verdicts on assault and battery and malicious prosecution are contrary to the evidence.

3. There was uncontroverted evidence in this case to establish the defendant's liability to plaintiff for assault and battery and malicious prosecution.

4. The verdict of the jury on assault and battery and malicious prosecution was against the weight of the evidence in this case.

5. The court erred in sustaining defense counsel's objections to questions asked of plaintiff's witnesses concerning changes that had occurred in plaintiff's physical condition since the assault and battery on plaintiff at defendant's establishment on August 24, 1981.

6. In connection with its charge on malicious prosecution, the court erred in refusing to instruct the jury, as requested by plaintiff, that defendant's employees did, in fact, initiate charges against plaintiff.

7. In connection with its charge on assault and battery, the court erred in instructing the jury that, under New Jersey statutory law, it is a violation to strike, kick, shove or engage in any offensive touching, or threaten to do so, inasmuch as plaintiff was never charged with violating that statute.

8. In connection with its charge on malicious prosecution and assault and battery, the court erred in instructing the jury that a casino has a common law right

to exclude persons who are disorderly, intoxicated or repeated petty offenders inasmuch as those conditions had no application to plaintiff in this case and such instruction was highly prejudicial to plaintiff.

9. In connection with its charge on malicious prosecution and assault and battery, the court erred in instructing the jury that a casino has a right to exclude disorderly persons, including persons who use abusive language. Such an instruction was unwarranted and prejudicial inasmuch as plaintiff was not charged with violating the New Jersey disorderly persons statute.

10. The court erred in refusing to charge on plaintiff's requested Instruction No. 17 pertaining to undisputed facts concerning the unlawful physical contact defendant's employees made against plaintiff.

11. In connection with its charge on assault and battery, the court erred in instructing the jury with respect to the use of self-defense by defendant's employees against an assault by plaintiff. There was absolutely no evidence in the case of an assault by plaintiff to support a self-defense instruction for defendant.

12. In connection with its charge on assault and battery, the court erred in instructing the jury that one would not be justified in using force for self-protection where a property owner is acting under a claim of right to protect its property. There was absolutely no evidence and, indeed, no claim in this case in defendant's Answer to Plaintiff's Complaint or in the Proposed Pretrial Order that defendant's employees were acting in protection of property.

13. The court erred in refusing to fully charge the jury on plaintiff's requested Instruction No. 19 pertaining to plaintiff's right to self-defense.

14. In connection with its charge on assault and battery, the court erred in instructing the jury that it could consider the actions of defendant's employees under stress conditions with no time for reflection or judgment. This negligence principle of law is known as the "emer-

gency doctrine" which has no application to the intentional tort of assault and battery.

15. The court erred by refusing to charge the jury in accordance with plaintiff's request that the use of mere words or gestures will not justify an assault and battery by defendant's employees.

16. In connection with its assault and battery charge, the court erred in instructing the jury, over plaintiff's objection, that the law does not require defendant to submit meekly to force.

17. In connection with its charge on malicious prosecution, the court erred in instructing the jury that defendant is responsible for the authorized or ratified acts of its employees, inasmuch as course and scope of employment was not at issue in this case.

18. In connection with its charge on assault and battery, the court erred in instructing the jury on the law of defiant trespass inasmuch as defendant never asserted that plaintiff returned to the premises after being advised that he would be considered a trespasser. That instruction had no application to the facts of this case, and was prejudicial to plaintiff.

19. In connection with its charge on compensatory damages, the court erred in instructing the jury that the standard to be used in fixing damages for future losses flowing from defendant's assault and battery is "reasonable certainty". The correct standard under New Jersey law is "reasonable probability".

20. In connection with its charge on compensatory damages, flowing from defendant's assault and battery, the court erred in instructing the jury that plaintiff had a duty to mitigate his injuries inasmuch as there was no evidence that plaintiff failed to seek medical treatment, and mitigation of damages has no application to the law and facts of this case. Moreover, the court erred in failing to charge on the defendant's burden to show failure to mitigate.

21. The court erred in failing to charge on plaintiff's requested Instruction Numbers 15 and 17 concerning assault and battery.

22. The court erred in failing to charge on plaintiff's requested Instruction Numbers 21, 22, 23 and 26 concerning malicious prosecution.

23. The court erred in charging, over plaintiff's exceptions, defendant's requested Instruction Number 21 concerning malicious prosecution.

24. The court erred in charging, over plaintiff's exceptions, defendant's requested Instruction Number 31 concerning factors to be considered in determining plaintiff's loss of earnings.

25. Plaintiff reserves the right to assign additional reasons in support of a Motion For New Trial on Count II (assault and battery) and Count III (malicious prosecution) upon receipt of a transcript of trial proceedings.

Respectfully submitted,

BEASLEY, HEWSON, CASEY,
COLLERAN, ERBSTEIN
& THISTLE

BY:_____
JAMES E. BEASLEY, Esq.
ANN M. LIACOURAS, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT F. SIMONE, *Plaintiffs*	:	CIVIL ACTION
v.	:	No. 82-1450
GOLDEN NUGGET HOTEL AND CASINO, trading as G.N.A.C. CORP., *Defendant.*	:	VOLUME 7

Philadelphia, Pennsylvania
March 29, 1983

BEFORE: HON. JAMES T. GILES, *J.*,
and a Jury.

APPEARANCES:

JAMES E. BEASLEY, ESQ. and
ANN LIACOURAS, ESQ.,
For the Plaintiff.

EDWIN L. SCHERLIS, ESQ.,
STEPHEN N. DRATCH, ESQ., and
ELENA YANDOLA, ESQ.
For the Defendant.

LYNNE T. ATTARDI
OFFICIAL COURT REPORTER

* * *

[p36] If you answer as to any claim that the claim was proven and was the proximate cause of harm, whether physical, emotional, or whatever, then you have to decide

what value in the way of money damages should be applied to the injuries or the harm of which you find, and you should express that in a lump sum. You must express it in a lump sum.

You get to damages if you found that there was legal responsibility. If you get to damages, then you must award the plaintiff a sum which will fairly, reasonably and adequately compensate him for all of the injuries which you find that he has sustained by reason of any unlawful conduct of the defendant, under either of those claims.

Compensatory damages are designed to compensate the plaintiff, a plaintiff, and they are not designed to punish the defendant.

A plaintiff who is injured by reason of some unlawful act, under our law, whether it's under these claims or under the principles of some other legal force or definition, is taken under the law as the defendant finds him, that is, if the plaintiff had a preexisting condition which
[p37] was not symptomatic but the defendant's actions caused those conditions, that condition to become symptomatic, then the plaintiff would be entitled to recover for the aggravation of the preexisting injuries.

Damages must be reasonable. And the plaintiff has the burden of showing by a fair preponderance of the evidence that the injuries are the proximate result — were proximately caused by the claimed unlawful act.

So the plaintiff has the burden with respect to the damage phase the case, the compensatory damage phase of the case to show that there were actual damages which were sustained as a proximate result of the defendant's actions.

The plaintiff claims certain physical injuries and embarrassment and mental anguish that's associated with having to defend certain charges or to recover from certain physical injury or to live with certain physical injury. The plaintiff claims past medical expenses to have been related causally to the actions of the defen-

[p37 Cont.] dant, claims that there were legal expenses causally related to the actions of the defendant's which were incurred in the defense of the charges in the criminal court in Atlantic City. It claims past pain and suffering. Past pain and suffering means from August 24, 1981 to the present time.

* * *

[p39] Now, the plaintiff, in addition, claims a value for any future medical expenses as shown by the evidence. You will have to review the evidence and decide whether or not the plaintiff will have to expend in the future any sums of money by standard of reasonably certain, that is, you have to decide yourselves whether or not you are reasonably certain that the plaintiff will have to sustain or will have to expend future sums of money for treatment for physical injuries if you find there are any related to this incident and charge the defendant.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARGOLIS, EDELSTEIN, SCHERLIS,
SAROWITZ & KRAEMER
By: EDWIN L. SCHERLIS, ESQ.
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ROBERT F. SIMONE, *Plaintiff*,	:	CIVIL ACTION
v.	:	
GOLDEN NUGGET HOTEL AND CASINO, t/a G.N.A.C. CORP., *Defendant*	:	NO. 82-1450

SUPPLEMENTAL REASONS FOR MOTION FOR A NEW TRIAL OF GOLDEN NUGGET HOTEL AND CASINO

AND NOW, this 27th day of June, 1983, after a review of the transcript of trial, the defendant, Golden Nugget, does supplement its Motion for a New Trial on the issues relating to false imprisonment and abuse of legal process as follows:

1. The trial court erred in permitting Dr. Simon to testify to the risks of surgery, if performed, on Robert Simone.

2. The trial court erred in its charge to the jury when it suggested the jury could multiply certain items of "special damage" by the life expectancy of the plaintiff.

Respectfully submitted,

MARGOLIS, EDELSTEIN,
SCHERLIS, SAROWITZ
& KRAEMER

By_____
EDWIN L. SCHERLIS
Attorney for Defendant